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Chairman: Ms. FLORES (Uruguay)
(Vice-Chairman)

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The meeting was called to order at 3.20 p.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (continued) (A/47/10 and 95, A/47/441-S/24559)

1. Mr. DESCHENES (Canada) said that, without sacrificing the high quality of its work, the International Law Commission should find an approach to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (A/47/10, chap. IV) that would allow it to advance more rapidly and achieve practical results, because the international community recognized the urgency of developing and codifying rules of general application on the matter.

2. Consequently, his delegation was disappointed by the Commission's decision regarding its future work on that topic. Although it was pleased to note that the Commission had decided that the solution would be to deal with both prevention and remedial damages, it was regrettable that remedial damages were to be discussed only once the Commission had completed its consideration of prevention. By deciding to draft articles in respect of activities having a risk of causing transboundary harm and not to deal at that stage with other activities which in fact caused harm, the Commission could well lose sight of the primary objective of the exercise: compensation for damages incurred and the elaboration of a regime of reparation, with appreciable harm as the primary factor triggering liability.

3. In 1988, Canada had agreed with the Special Rapporteur's three guiding principles: (1) the draft articles must ensure that each State had as much freedom of choice within its territory as was compatible with the rights and interests of other States; (2) the protection of such rights and interests required the adoption of measures of prevention and, if injury nevertheless occurred, measures of reparation; and (3) in so far as consistent with those two principles, the innocent victim should not be left to bear his loss or injury. Canada continued to believe that those principles struck a good balance between the right and the corresponding obligation of a State to be free to act, but not so as to cause injury to other States, and that those principles remained the foundation for the Commission's work.

4. Although the Working Group had decided to determine at a later date the nature of the draft articles and the eventual form of the instrument to be elaborated, his delegation felt that the Commission should be focusing on elaborating a draft convention. Although development of the law concerning international liability for injurious consequences arising out of acts not prohibited by international law was fraught with difficulty and complexity, the Commission should nevertheless be able to provide the solutions required by the international community.

5. Mr. TANG Chengyuan (China), referring to international liability for injurious consequences arising out of acts not prohibited by international law (A/47/10, chap. IV), said that his delegation did not object to the Commission's decision that the topic should comprise both prevention and remedial measures, but wished to stress again that failure by a State to take preventive measures or to take insufficient or incomplete preventive measures did not in itself entail liability. Otherwise, there would be no difference between the topic and that of State responsibility.

6. Also, China fully agreed with the Commission's decision to focus attention for the moment on drafting articles in respect of activities having a risk of causing transboundary harm by considering first the question of prevention and then that of remedial measures, and not to deal with activities which in fact caused harm until after having completed consideration of the former. On the other hand, the view of the Commission that it was premature to take a final decision on the nature of the instrument that would emerge from its work on the topic, while generally valid in the case of work involving codification was not applicable in the current instance, which was in the nature of a progressive development of international law. The issues involved were sensitive and complex and made it an extremely difficult task to formulate draft articles forming a convention that would be generally acceptable to States. The most prudent course would be a two-stage approach. As a first stage, the Commission should draft an instrument in the form of a declaration or of guidelines, on the basis of which the draft articles could later be cast in the form of a convention. To be overly ambitious regardless of the realities would be counterproductive, however good the intention. In view of the difficulty of the topic, the novelty of the concept and the divergence of views that had emerged, his delegation hoped that the Commission would study those suggestions and at the same time reconsider its decision, in order to conclude its consideration of the topic rapidly by presenting a set of draft articles acceptable to all States.

7. As to the draft articles specifically on prevention, his delegation agreed with the Special Rapporteur that they should be only in the nature of recommendations. In general, it would be useful to give further study to the appropriateness of having them serve as general rules applicable to all activities falling within the scope of the topic.

8. With regard to draft article 1, his delegation shared the view of some members of the Commission that the provisions on authorization and assessment were self-evident and in keeping with State practice. The environment, life and property of the inhabitants of the territory of the State of origin itself would be the first to be affected by the harm caused by activities involving risk as a result of accidents or other occurrences. States normally permitted such activities to be undertaken within their territory only with their prior authorization, and they set standards for assessing the potential socio-economic and environmental impacts. It was questionable whether the provision in draft article 1 for the assessment of transboundary harm was practical.

(Mr. Tang Chengyuan, China)

9. It would not, on the other hand, be practical to make draft article 2 into a general rule. It was hard to see why a State would notify a potentially affected State when it knew in advance that the planned activity was going to cause transboundary harm. Draft article 2 would only serve to invite the affected State to veto the planned activity. Ordinarily, once the State of origin was aware in advance that the planned activity was going to have harmful transboundary effects, it took the initiative to have the plan changed. In respect of certain activities, the State concerned would make a point of declaring certain areas situated beyond the jurisdiction of States to be off limits for a specific period of time, and of warning foreign means of transport and personnel, in order to avoid any injurious consequences.

10. The purpose of draft article 4 was far from clear. As with draft article 2, if a State was aware that an activity that it had planned would cause significant harm, then it would not authorize it. On the other hand, if the transboundary harm arising from an activity was of a purely cumulative nature, it would then be not so much a matter for consultation, alternatives or settlement of disputes under articles 5 and 8, as one requiring international cooperation and good faith.

11. Finally, any prevention regime should take full account of the interests and particular situations of the developing countries. Indeed, in those countries, the activities concerned were often carried out by transnational corporations. Because they lacked the necessary scientific and technological know-how and financial means many developing countries were not in a position to control or regulate those activities.

12. His delegation sincerely hoped that the Commission would quickly complete its work on the topic so as to meet the pressing needs of the international community.

13. Mr. AL-BAHARNA (Bahrain) shared the opinion expressed by the Commission in paragraph 291 of the report on the work of its forty-fourth session (A/47/10), that successful work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law would benefit all States and constitute a major contribution to the progressive development of international law and its codification. He also supported the Commission's decision (para. 344) to approach consideration of the topic in stages by establishing priorities for the issues to be covered, and its decision (para. 346) to deal first with preventive measures in respect of activities having a risk of causing transboundary harm. While that approach could appear somewhat doctrinaire and impractical inasmuch as there was a fine line between activities having a risk and those causing harm, the Commission would not experience too many difficulties in following that approach, as it had always worked on the assumption that the topic covered both types of activities.

14. With regard to prevention, his delegation was no more convinced than several members of the Commission (para. 296) that preventive rules should be

(Mr. Al-Baharna, Bahrain)

placed in an annex, separated from the main body of the text of the future instrument or that their character should remain recommendatory. Indeed, if prevention was to be considered the core of the topic, it should be elevated to the status of a principle having binding force. The Commission should therefore be urged to consider the preliminary question of whether preventive rules should or should not be binding in nature before starting to work out detailed rules on the subject. The need for an obligatory preventive regime governing accidents with international consequences had become an imperative in the aftermath of the Chernobyl and Rhine disasters.

15. With respect to the specific provisions discussed in the report, he observed that editorial changes were required in draft article 1 ("preventive measures") in order to remove any impression that interference in the internal affairs of States was authorized, and to clarify the purpose of the article, which was that due diligence should be observed by the wrongdoing State. In addition, the idea of establishing an insurance system, which had been suggested by some members of the Commission (para. 307), also deserved to be incorporated into the text.

16. With regard to draft article 2 ("Notification and information"), his delegation shared the views of those members of the Commission who supported it, subject to the reservation that the requirements of notification and information should become mandatory.

17. The Commission should probably reconsider draft article 3 ("National security and industrial secrets") to give members an opportunity to reflect on its implications for the prevention regime envisaged under the articles. Indeed, article 3 appeared to offer a loophole for States to escape from the obligatory prevention regime. In order to prevent such a situation, his delegation suggested, first, that the concepts of "national security" and "industrial secrets" should be duly qualified, and, secondly, that the latter part of the article, referring to information, should be strengthened so as to establish a proper balance between the imperatives of security and the provision of data and information pertaining to transnational harm. Subject to those caveats, his Government would support the text of article 3.

18. While he agreed with the criticisms that draft article 4 ("Activities with harmful effects: prior consultation") would give the affected State a veto in respect of activities with harmful effects, and that there was no valid reason for distinguishing it from article 6, he suggested that draft articles 4 to 6 should be streamlined in order to clarify the purpose of consultation, remove the "veto" idea and maintain a balance between the interests of the State of origin and the affected State or States.

19. His delegation would support draft article 7 ("Initiative by the affected States"), with the reservation that the requirement in the last sentence of the article should be deleted, as it might produce an effect contrary to what was intended.

(Mr. Al-Baharna, Bahrain)

20. He was sceptical about the usefulness of draft article 8, relating to the settlement of disputes. Indeed, he wondered whether there was a need for the settlement of disputes if, by definition, the activities falling within the purview of the articles were not prohibited by international law.

21. Draft article 9 ("Factors involved in a balance of interests") was too important to be placed in a commentary, much less to be left out of the text entirely. If the Commission considered it desirable to place it in an annex, his delegation would support such a decision. He pointed out that article 5, ("Factors") in the Draft Articles on the Law of the Non-navigational uses of International Watercourses which the Commission had adopted, had been placed in the text itself. His delegation would, however, suggest that the Commission should review draft article 9 in the light of the changes that were to be made in the other articles.

22. Finally, the proposed new definitions for the terms "risk", "damage", "transboundary harm" and others in article 2 of the draft articles appeared to be too unwieldy and detailed for application. The definition of "risk" - which was the essential core of the topic - was a good example. The proposed definitions of risk and damage could be simplified by retaining the essential elements in the text and relegating the non-essential elements to the commentary. As for the definition of "transboundary harm", he believed that it should be expanded to include damage to the so-called global commons - whether or not the topic dealt with activities causing damage to the global commons - as transboundary harm inevitably affected the global commons.

23. In conclusion, he urged the Commission to accelerate the pace of its work so as to complete its consideration of the topic before the term of its present members expired.

24. Mr. KRAICHITTI (Thailand) said that, in view of the fact that present-day economic activities and technology involved considerable risk to human lives and the environment, the study that the International Law Commission had devoted to prevention in the context of the subject of international liability for injurious consequences arising out of acts not prohibited by international law (A/47/10, chap. IV) was most timely. His delegation considered that the regime of prevention should be applied only to activities which risked causing transboundary harm, and not to those which, in the normal course of events, actually caused, or had already caused, transboundary harm. Where the obligation to make reparation was involved, the latter two activities should be treated under the regime of State responsibility. A State might fail in its international obligations, by omitting to take the necessary preventive measures when conducting lawful activities involving a risk of transboundary harm, but it would not be obliged to make reparation as long as such activities had not actually caused harm to other States. The reason was that responsibility arose from a breach of international law, whereas the obligation to make reparation arose directly from the damage.

(Mr. Kraichitti, Thailand)

25. His delegation found it difficult to accept that States had an obligation to notify their neighbours of their intention to undertake activities involving risk, particularly when that obligation might even render those activities subject to the approval of the neighbouring States. It would be wiser to oblige States to provide any State so requesting with assurances that adequate preventive measures had been taken in compliance with their international obligations.

26. In drafting the article dealing with the prevention rules, the focus should be on determining minimum standards and the degree of vigilance required of States conducting activities involving risk. In so doing, account must be taken of the following factors: the stage of economic development of the country conducting the activities, a balance of interests, the importance of the activities to the economic development of the country of origin, and the existence of possible alternatives.

27. The draft article did not distinguish between activities conducted by the State itself and those conducted by private operators. A distinction should be drawn between those two types of activity, as well as between the nature and scope of the obligation to make reparation of both types of operator, in cases where transboundary harm might occur.

28. With regard to the other draft articles prepared on the same subject, his delegation regarded article 1 as fair and reasonable. To require States to adopt legislative, administrative or enforcement measures should not be regarded as interference in the internal affairs of States. Article 2, however, served no useful purpose, and was impractical. For if an activity had a risk of significant transboundary harm, it would be a wrongful act and the State of origin should refrain from doing it anyway. To extend the scope of the article to that type of activity would be to contradict the title of the topic, which dealt only with activities not prohibited by international law. It would be unreasonable to expect States to refrain from undertaking lawful activities because their assessment of those activities revealed possible transboundary harm, particularly in cases where such activities were considered essential to the development of that State and where there was no alternative.

29. Similarly, the purpose of articles 4 to 8 also seemed unclear, and their provisions impractical. If a State envisaging activities involving risk chose not to notify its neighbours of its intention, it could hardly be expected to consult the States likely to be harmed by those activities. Article 9, however, served a useful purpose, in setting forth the criteria for assessment of the rules of prevention and the degree of vigilance required of States conducting activities involving risk.

30. Thailand considered that it would be futile to adopt articles dealing with prevention that were not binding in nature. If they were to be binding, they would have to take the final form of an international convention. His

(Mr. Kraichitti, Thailand)

delegation also welcomed the Commission's decision to focus at that stage only on the articles dealing with activities involving a risk of transboundary harm, and not on those which in fact caused such harm.

31. Mr. GODET (Observer for Switzerland) noted that the members of the Commission were still broadly divided on the fundamental questions underlying the subject of liability for injurious consequences arising out of acts not prohibited by international law (A/47/10, chap. IV). The Swiss delegation supported the idea of introducing a regime of international liability based essentially on the occurrence of transboundary harm resulting from a dangerous activity. A regime of objective liability should not go so far as to impose on the State of origin a primary obligation of reparation, and liability should be invoked only when the author of the harm suffered did not comply with its duty to make reparation.

32. The Swiss delegation welcomed the Commission's decision to give priority to consideration of the question of prevention, before turning to the means of remedying damage. That being said, in cases where transboundary harm nevertheless arose, compliance with the obligation of prevention should not have the effect of diminishing the subsidiary obligation to make reparation to the State in question.

33. Without calling into question the Commission's decision on that subject, his delegation nevertheless considered that activities involving risk and activities with harmful effects were subject to the same regime of prevention: at that level, there was no fundamental difference between the two types of activity.

34. With regard to the nine new draft articles that the Special Rapporteur had submitted, his delegation would confine itself to some general remarks on the articles on prevention in the case of activities involving risk. Draft article 1 was entirely satisfactory; for it was not superfluous to remind States that the occurrence of transboundary harm resulting from dangerous activities carried out under their jurisdiction or control might entail their liability, a corollary of sovereignty. The main thrust of draft article 2 was worthy of retention, for it seemed desirable that a State which, having examined the socio-economic and environmental incidences, authorized an activity involving risk on its territory should communicate the results of that study to the States likely to be harmed by the activities envisaged. The exception provided for in draft article 3 was justified, and might prove of value, provided that States did not abuse it.

35. Regarding draft article 6, which, according to the commentary, should be redrafted, his delegation considered that, without seeking to attenuate the need for prevention, care must be taken to ensure that the new version did not lead to imposition of a systematic requirement for any State envisaging an activity involving risk to consult all States potentially affected. That would be tantamount to conferring the right to veto dangerous activities

(Mr. Godet, Observer, Switzerland)

undertaken in the State of origin on any State claiming to be exposed to risk. Conferral of such a right would be unwarranted.

36. The same reservation applied to draft article 7, which was intended to grant a potentially affected State the right to request consultations or even negotiations with the State of origin. Moreover, the obligation set forth in the last part of the article and the reference to draft article 2 were of little value. It would perhaps be preferable to incorporate the question of initiative by the affected States into article 6, instead of devoting a separate provision to it.

37. The fundamental character of draft article 8 was not in question. Given the danger of activities posing risk, it was essential to work out procedures for the settlement of disputes. A suitable settlement procedure should preserve the right of each party to appeal unilaterally to a third party, in the event of the failure of negotiations. The decision by the third party should, if possible, be binding.

38. While draft article 9 might prove to be of use to States during consultations, the factors involved in a balance of interests, as set out in the article, should be merely in the nature of guidelines or recommendations so that States would be free to apply other criteria, depending on the activity undertaken or envisaged.

39. In conclusion, his delegation stressed that, while the definition of risk was acceptable in substance, the complicated and, at times, imprecise wording needed to be improved. In respect of the concept of damage, the new formulation was based largely on that used in the draft convention on civil liability for damage resulting from environmentally dangerous activities, and constituted an excellent starting-point for the Commission's future work.

40. Mr. AL-KHASAWNEH (Jordan) said that, in his view, State responsibility occupied a central position in the system of international law. His delegation welcomed that fact that the Drafting Committee had adopted on first reading the six draft articles relating to the substantive consequences of internationally wrongful acts (A/47/10, chap. III).

41. With regard to the complex and controversial question of the instrumental consequences of internationally wrongful acts, his delegation did not favour the complete deletion of the articles relating to that matter. It would be unrealistic to believe that by removing any reference to countermeasures from the draft, they would disappear from international relations. The moral and legal dilemma of countermeasures was not unlike that which had arisen at the time of the codification of humanitarian law. The similarity was based, in particular, on the central role of the concept of proportionality, the inadequacy of which was apparent to all. Since that concept offered only illusory guarantees, it was important to learn from the lessons of the past and place more stringent conditions on the admissibility of countermeasures.

(Mr. Al-Khasawneh, Jordan)

42. In that connection, his delegation believed that it was vital to include in the draft a procedure for third party settlement of disputes. It agreed with the Special Rapporteur that "any regulation of countermeasures which did not go hand in hand with dispute settlement procedures was fraught with the danger of abuse to the detriment of weaker and poor States" (para. 163).

43. An attempt should also be made to specify more precisely the cases in which resort to countermeasures was strictly prohibited. That was the subject of draft article 14, which defined five areas in which countermeasures were prohibited. In his delegation's view, however, there was room for improvement in that categorization, through either amplification or, where necessary, the addition of new categories. It might be useful, for example, to determine whether, as his delegation believed, property rights should be considered as fundamental human rights and, as such, protected absolutely against countermeasures. Similarly, it might be necessary to give separate treatment to treaties establishing boundaries and those containing termination or suspension clauses which were envisaged as countermeasures. His delegation believed that the inadequacies of the concept of proportionality might be offset by the inclusion in the draft of formal prohibitions.

44. With regard to draft article 12, his delegation agreed with the view expressed by the representative of Austria that the exhaustion of amicable settlement procedures should be a parallel obligation rather than a condition to be met before any resort to countermeasures. It would be better to provide for a regime under which the right to resort to countermeasures would be suspended if the wrongdoing State agreed to a dispute settlement procedure which could give rise to a legally binding determination on the wrongfulness of the act and the question of reparations. The wording of paragraph 3 of the article was not at all clear, as the Special Rapporteur himself had admitted.

45. As for the question of countermeasures in the context of "self-contained" regimes, it was impossible to settle it by asserting that it was a matter of treaty interpretation. Such regimes had special characteristics, as defined by the Special Rapporteur (para. 251). In any event, the question merited further reflection in the light of the tendency, in the area of State responsibility, to establish different regimes for different types of responsibility. In addition, when in the context of a treaty regime, States stipulated the consequences of any violation of that regime, it should be understood that those States thus expressly excluded any other measure under any other system and that, if their intentions were not clear, the presumption should be in favour of the exclusion rather than the inclusion of external measures.

46. On the question of differently injured States, his delegation believed that article 5 bis should be supplemented by a provision specifying that the capacity of differently injured States to take countermeasures should be proportional to the degree of injury suffered by the State taking the measures. In that connection, the assessment of what constituted a

(Mr. Al-Khasawneh, Jordan)

proportional response was made even more complicated by the fact that the State applying the countermeasures had to take into account the measures taken by other injured States. His delegation also believed that if the State or States most affected failed to claim restitutio in integrum, no other State should be able to do so.

47. With regard to the relationship between the draft articles under elaboration and the Charter of the United Nations, his delegation fully agreed with the Special Rapporteur that the unqualified reference to the provisions of the Charter concerning the maintenance of international peace and security would not necessarily be appropriate in order to implement the rules of a convention on State responsibility with due regard for the equality of States and the rule of law in international relations.

48. Mr. OSHODI (Nigeria) said that the Commission had requested a clear indication as to whether it should embark on a draft statute of an international criminal court. Many issues remain unsolved in the international criminal system relating to the definition of offences and of penalties that would arise from such offences. Nigeria had already stated its preference for the Commission first completing the draft Code before considering the question of a criminal court. He was gratified that the Commission had already adopted on first reading the draft articles which had been sent to Governments for comments and observations. Nigeria would take part in all efforts that would enhance and strengthen the international legal order by ensuring that those who committed serious offences against the peace and security of mankind were held fully accountable for their crimes. It would join in any consensus on a draft statute that would attract a broad majority of States. However, the Commission should adopt a flexible approach which would lead to agreement. Nigeria accepted the proposal to extend the Commission's mandate to prepare a draft statute.

49. Nevertheless, his delegation wished to make a number of more detailed observations on the proposed statute. First of all, the court should be established by a statute in the form of a treaty agreed to by States parties. Secondly, financial considerations should not impede the creation of a permanent institution. There was no need for a large court, and at the initial stage a permanent structure could be envisaged that could develop gradually as the need arose. Lastly, it would be preferable for the court to have exclusive jurisdiction over certain international crimes and concurrent jurisdiction over others. There would be no difficulty in the court having jurisdiction over certain crimes of an international character defined in international treaties, inter alia, the Code of Crimes Against the Peace and Security of Mankind.

50. In any event, it was important that the relationship between the Code and the court should be clearly defined, especially since there was no need for a Code without a court to enforce it. Nigeria's preference was for an open linkage. However, as a compromise, it supported the flexible approach of making the draft Code and the statute of the court separate instruments.

(Mr. Oshodi, Nigeria)

51. The Commission must consider and resolve the conflict of interests that would arise between States in whose territory the crime had been committed, the State that had custody of the accused, the State whose nationals were the victims of the crime and the State of which the accused was a national. It would be highly undesirable if the jurisdiction of the international criminal court were to be ousted by the State in which the crime had been committed or by the victim States. Accordingly, Nigeria favoured a situation in which the international criminal court would be seized of a matter by the State with custody of the accused and which had jurisdiction over the offence under its domestic law or under international law. Moreover, the court could enter into an agreement with the United Nations, as a specialized agency. That would provide it with the possibility of utilizing the registry services of the International Court of Justice or the United Nations Legal Counsel's office.

52. The question of the law to be applied by the international criminal court would be crucial to its success. Its jurisdiction should be limited to offences which were genuinely of an international character as defined by treaties in force. However, most treaties were silent about defences and extenuating circumstances, such as the age of criminal responsibility, mental state, duress, self-defence, insanity and the like. If necessary, resort could be had to the domestic law of the State on whose territory the crime had been committed, or of the State which had jurisdiction to prosecute the criminal. Such a system would have the disadvantage of a lack of uniformity, although it would be consistent with the traditional territorial nature of criminal jurisdictions.

53. There was bound to be controversy surrounding the range of punishments that could be imposed by the court. It was possible to doubt whether it would be justified to confer on a strictly criminal proceeding the power to award claims for damages. The imposition of fines and the forfeiture of the proceeds of crime seemed more appropriate than the award of damages in the form of compensation.

54. His delegation supported the observation made by the Commission in paragraph 504 of its report, and considered it essential that accused persons should receive a fair trial. The court should adhere to the highest standards and under no circumstances try defendants in absentia. Prosecution before the court should be by an independent standing prosecutorial organ, or by an interested State as the need arose. Such a solution would incorporate the procedure adopted by both the civil and common law systems, especially if the accused were entitled to a preliminary hearing before a panel of the court to determine the merits of the case.

55. States should not refuse to hand accused persons over to the court on the grounds that their crime was political, or simply on the basis of their nationality, although the court should only try persons who were lawfully brought before it. A general provision for assistance could be inserted into the court's statute stating clearly under what circumstances assistance should be granted or denied.

(Mr. Oshodi, Nigeria)

56. Turning to the issue of State responsibility (chap. III) he said that the Commission should take advantage of the favourable circumstances created by the disappearance of the ideological confrontation to complete the preparation of the draft on State responsibility. Codifying the issue of reprisals or countermeasures was not an easy task and, as had already been mentioned, the rich and powerful countries could easily take advantage of the weak and poor ones. That was a problem which the Commission should constantly keep in sight.

57. As far as the issue of self-contained regimes was concerned, Nigeria was more inclined to agree with the proposition that "external" unilateral measures should be resorted to only in extreme cases (para. 256). The procedure provided for in international treaties in force should take precedence over the right of States to resort to countermeasures under general international law.

58. The power of decision of the Security Council was strictly confined to measures aimed at restoring international peace and security under Chapter VII of the Charter, and the Council was not empowered to impose on States settlements or settlement procedures in relation to disputes or situations dealt with in Chapter VI, on which it could only make recommendations. Nigeria favoured retaining draft article 4, but deleting the words "as appropriate", which subordinated the provisions of the draft to those of the Charter of the United Nations. It also approved draft article 5, already adopted by the Commission, and saw no need for draft article 5 bis as suggested by the Special Rapporteur.

59. To conclude, he said that his delegation had taken note of the progress made by the Commission in its work on the topic of international liability of States for injurious consequences arising out of acts not prohibited by international law (chap. IV). It had also noted that the Commission intended first of all to consider the question of preventive measures before deliberating on remedial ones. In his delegation's view, that should not relegate into the background remedies aimed at mitigation, restoration and compensation.

60. Mr. NASIER (Indonesia) said that as a result of the historic transformations on the international political scene in the post-cold-war period, respect for international law in inter-State relations was the foundation for world peace and prosperity. Any new world order should be based on the primacy of the rule of law without exception.

61. Turning to the various topics addressed in the Commission's report (A/47/10), he first of all drew attention, in connection with the establishment of an international criminal jurisdiction, to the complexity of all the issues which, in the view of the Commission's working group, would have to be resolved before any such body could be established, and which were set out in paragraph 414.

(Mr. Nasier, Indonesia)

62. First, there were tremendous political and technical complexities involved in establishing international criminal jurisdiction. Although its establishment might be desirable from an ideal point of view, its feasibility was questionable. There were numerous insurmountable obstacles involved, including the surrender of a State's sovereignty, the relationship between international law and domestic laws, and the undermining of the principle of aut dedere aut judicare.

63. Secondly, the structure of the court should be flexible. It should be an ad hoc body, in the sense of a body created ex post facto, rather than a permanent mechanism. In that connection, questions arose as to its composition, which should be determined in each specific case, and the impartiality of the judges who would preside over the trials.

64. Thirdly, it would be necessary to determine what kind of jurisdiction the court could exercise: namely, should it be binding, optional, exclusive, concurrent with that of national courts or of a review character; should it be linked to the Code or not; who would be entitled to bring a complaint; and which State or States would have to give consent for the court to exercise jurisdiction in respect of the individual charged with the crime. On the first question, his delegation endorsed the proposal that consent should be the basis for the court's jurisdiction. Secondly, its competence should be optional and concurrent with that of national courts, which could not be divested of their jurisdiction held under their domestic law and general international law. Thirdly, the Code and the court's statute should constitute separate instruments; in other words, a State should be free to become a party to the Code without accepting the court's jurisdiction. Fourthly, only States parties to the court statute should have the right to institute proceedings. However, the court's jurisdiction ratione personae should be confined to individuals and cover only serious crimes against the peace and security of mankind, such as apartheid, aggression, State terrorism and serious cases of international drug trafficking.

65. Turning to the subject of State responsibility (chap. III), he said that, in his view, it should be dealt with in a much broader context, taking into account the interests of newly dependent States which came into existence before the traditional rules of international law were formulated. As the Special Rapporteur said, powerful or rich countries would be at an advantage in their exercise of reprisals against the wrongdoing States, as such action would lead to abuse of the weaker States. In fact, it was often the injured States which took countermeasures in breach of their international obligations. Furthermore, rather than being aimed at restitution or reparation, countermeasures generally tended to be punitive, while armed countermeasures were contrary to article 2, paragraphs 3 and 4, of the Charter. Accordingly, countermeasures had no place in the law on State responsibility. Other opportunities for redress, notably dispute settlement procedures, retortionary measures and diplomatic protests, were preferable.

(Mr. Nasier, Indonesia)

66. His delegation was in general agreement with much of the substance of the Special Rapporteur's report on international liability for injurious consequences arising out of acts not prohibited by international law (chap. IV). It was self-evident that the progressive development of legal rules to address the mounting environmental issues was now paramount.

67. Finally, his delegation particularly welcomed the Commission's activities within the framework of the Decade of International Law (paras. 374 and 375). In that regard, it looked forward to the publication of a series of articles prepared by Commission members. It expressed its steadfast support for the mutually beneficial and constructive cooperation that existed between the Commission and the Asian-African Legal Consultative Committee, an activity which should be enhanced in order to reflect more fully the views and positions of the non-aligned countries in the formulation of new principles of international law.

68. Mr. STANCZYK (Poland) stated that his country, which had already approved the International Law Commission's mandate to consider issues relating to the establishment of international criminal jurisdiction, supported giving the renewed mandate sought by the Commission to enable it to undertake the project of creating the proposed jurisdiction.

69. The Commission's report indicated seven "basic propositions" (para. 395) reflecting the fundamental approach of the Working Group, which had thus laid the groundwork for further debates and offered a number of solutions. The time had certainly come to take the initiative. Although the idea of bringing those who had committed international crimes or offences to justice by a concerted international effort had been mooted for several decades, only now could States begin to give it their attention. The report of the Working Group and the present debate demonstrated awareness that a host of problems remained to be solved. It was to be hoped that the difficulties would be overcome.

70. His delegation shared the view of those advocating separation of the statute of the court and the Draft Code of Crimes against the Peace and Security of Mankind. Such a separation would facilitate the adherence to the statute by as many States as possible. However, that should not lower the legal status of the Code itself. It simply meant that a State could become party to the statute without automatically becoming party to the Code. A link of substance between the two instruments could not and should not be denied.

71. His delegation believed that the proposed international mechanism should have the following features, which it believed to be of particular importance: first, the jurisdiction of the court should be confined to private persons, and not to States; secondly, jurisdiction should be voluntary, or in other words, it should arise under an express declaration which was distinct from the adherence of the State; thirdly, the jurisdiction of courts of the States parties to the statute should not be ousted as a consequence of the

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establishment of the international court; they should have concurrent jurisdiction. Finally, the court should not be a standing, full-time body.

72. Explaining more specifically his delegation's view of the future international criminal court, he favoured a scheme that was likely to be accepted by the greatest number of States. He noted with satisfaction the near-unanimity on a number of issues. Those advocating more ambitious solutions would perhaps see their views gaining more support at a later stage. A successful functioning of the court, once established, could induce many States to reconsider their present stand. His delegation intended to respond positively to new needs and initiatives designed to develop the scheme. For the time being, however, it believed that the fastest possible progress should be made whenever the chance of agreement was forthcoming. In his view, it was worthwhile following the scheme outlined in the report of the Working Group, as it stood a chance of resulting in a workable system.

73. With regard to the structure and nature of the court, Poland believed that the new body should be established by means of a treaty agreed to by States parties. The possibility of using the United Nations Legal Counsel's Office as a registry deserved serious consideration. Judges should be chosen from a list in accordance with the method adopted for the Permanent Court of Arbitration. His delegation would not, however, advocate the establishment of close relations between a criminal court and the International Court of Justice, for example, by allowing a judge to sit on both courts at the same time.

74. His delegation saw the advantages of having persons accused of committing crimes tried by an international court. A more modest approach, however, also appeared to have its advantages. In particular, it would allow for a wider acceptance of the scheme by States, while offering a basis on which to build later. At the current stage, it was essential to win over as many States as possible to the idea of an international criminal court, while setting up a mechanism which could evolve without arousing the concern of any State. The conflict between compulsory and voluntary jurisdiction amounted, therefore, to a problem of the ripeness of the ideas involved.

75. With regard to the court's jurisdiction, his delegation accepted the Working Group's proposition that it should be limited to the crimes defined in specified international treaties in force. The court's jurisdiction should, of course, extend to the most serious offences. That applied, in particular, to drug trafficking offences. The treaty basis of the jurisdiction rationae materiae could be extended once the draft Code of Crimes against the Peace and Security of Mankind had entered into force.

76. Many previous speakers had, like the Working Group, stated that the jurisdiction rationae personae raised a considerable number of difficult problems, and his delegation concurred with that view. Nevertheless, it endorsed the solution provided for "the most straight-forward case(s)", as

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outlined in paragraphs 454 and 455 of the Working Group's report. Poland further agreed that the concept of "ceded jurisdiction" could be the basis of a useful conflict-resolution rule. In addition, careful consideration should be given to eliminating the requirement that both the territorial State and the State of nationality of the perpetrator should consent to the court's exercise of jurisdiction.

77. Guarantees of due process were of particular importance. Legal safeguards must be provided for in the court's statute. They must be no less exacting than the standards embodied in international human rights instruments. Furthermore, the court's rules of procedure would necessarily draw upon those embodied in national laws. Extremely close attention should be paid to the complex issues relating to prosecution, evidence, penalties and the implementation of sentences. Poland shared the concerns expressed by the United Kingdom on that subject and was similarly anxious to find the best solutions.

78. Turning to chapter III of the report, he said that his remarks would be limited to the legal regime of the measures that an injured State could take against a State having committed an internationally wrongful act. As previous speakers, as well as the Special Rapporteur, had stated, such measures had to do with the largely imperfect nature of the enforcement mechanisms currently available in international law. States should be entitled to adopt such measures provided that they were carefully defined. It was essential to exclude any possibility of abuse, and any further work on the subject must be carried out with a view to restricting, or indeed, eliminating, the negative phenomena associated with the use of countermeasures to date. Efforts must be made to establish a balanced regime.

79. From that point of view, even symbolic measures could be important. For that reason, the general rule expressed in draft article 11 should be formulated in negative terms, as follows: "An injured State [...] is not entitled not to comply with one or more of its obligations [...] unless the following conditions have been fulfilled". That would not change the meaning of the draft article, but it might change the attitude of States towards the regime in question. There should be at least five conditions for the legality of countermeasures: the existence of an internationally wrongful act; the submission by the injured State of a demand for cessation and reparation; the exhaustion of available dispute settlement procedures; the communication by the injured State of its intention to resort to countermeasures; and respect for the rule of proportionality. Poland reserved its opinion as to whether a requirement concerning the aim of countermeasures should be added to that list, although, in its view, a punitive aim should be expressly prohibited.

80. With regard to draft article 12, the Special Rapporteur had rightly held that the exhaustion of amicable settlement procedures should constitute a precondition for resort to countermeasures, and not a parallel obligation. The reasons for that were numerous and quite obvious. The Special Rapporteur had rightly provided, in paragraph 2 (a), that the injured State was not

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required to exhaust dispute settlement procedures where the State which had committed the internationally wrongful act did not cooperate. Accordingly, the condition stipulated in paragraph 1 (a) of the article was not an insurmountable obstacle to the adoption of countermeasures. He wondered whether the term "dispute settlement" might not be more appropriate than "amicable settlement", as that would bring the provision into line with the standard formula used in international instruments.

81. Paragraph 2 (b) appeared to be tainted by a misunderstanding of the concept of interim measures of protection. Such measures were usually ordered by a court or a tribunal pending the outcome of a case, in order to safeguard the rights of one or both parties. One of the main conditions of admissibility of such measures was the existence of a risk of "irreparable harm". Such measures were usually imposed on the wrongdoing State. By definition, interim measures were narrower and more technical than countermeasures which, pursuant to draft article 11, could take the form of non-compliance by an injured State with one or more of its obligations towards the wrongdoing State, subject to the restrictions in draft article 14. The injured State was usually incapable of "taking" an interim measure, in the proper sense of the term, if the wrongdoing State did not cooperate. Once that State did cooperate, however, its cooperation usually took the form of cessation and/or reparation, which ended the dispute. Hence, article 12, paragraph 2 (b), was conceptually inappropriate.

82. There was another reason to question the current wording of draft article 12: in practical terms, it transferred to the injured State the power to order interim measures, which properly belonged to an international court, and thus the power to implement a "provisional" judgement by that State in sua causa. That was not conducive to bringing the other State before a court in order to proceed with a third party settlement. It should be noted that paragraph 2 (b) was applicable only where the States concerned had accepted the third party settlement procedure and when they might at any time bring a case before an international body. Accordingly, such a body could, as a matter of priority, render a decision as to the admissibility of interim measures before any need arose for a State to take action unilaterally. If the wrongdoing State did not appear before the court, the body in question was not prevented from ordering interim measures. The practice of international tribunals had shown that, in that process, courts were guided by considerations relating to jurisdiction over the case and the parties. It might be that many States would unilaterally resort to interim measures which would subsequently be declared inadmissible by a tribunal or a court because of the frivolous invocation of its jurisdiction. That situation was not excluded by the current wording of paragraph 2 (b), however.

83. In sum, any unilateral decision to adopt interim measures was either covered by the more general wording of paragraph 2 (a), because it would simply involve a countermeasure, rather than an interim measure, or by the wrongdoing State's acceptance of a third party settlement, in which case the need for such measures hardly arose.

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84. With regard to draft article 12, paragraph 3, many members of the Commission had already expressed the view that it required clarification and could not be accepted in its current form.

85. As to draft article 13, his delegation endorsed the formula used by the Special Rapporteur. The criterion of the effects of an internationally wrongful act provided a necessary limit to the concept of "gravity", which was liable to subjective interpretations. Thus, in its current wording, draft article 13 could serve as a general rule, without imposing on an injured State a detailed regulation to which it must adhere. Nevertheless, as it might be desirable to expand the conditions for resort to countermeasures by including a reference to their aim, namely, the cessation of wrongdoing and the initiation of a settlement procedure, much of the criticism directed at the lack of clarity in draft article 13 might become irrelevant. In any case, as his delegation had already stated, draft articles 11 to 13 should be combined in a single provision which would express, in negative terms, a general rule and the conditions for resort to countermeasures.

86. His delegation would favour some changes in article 14. It was not clear why paragraph 1, subparagraph (a) and subparagraph (b) (i) and (iii) could not become subparagraphs (a), (b) and (c) of paragraph 1. Furthermore, it was not clear whether paragraph 1, subparagraph (b) (ii) should be retained. Finally, paragraph 1, subparagraph (b) (iv) could become paragraph 2. The problem, however, did not stop there. There remained a problem of overlap between the aforementioned provisions in paragraph 1. Paragraph 1, subparagraph (b) (iii) could be made a residual rule, by rewording it to read "any other conduct contrary to a peremptory norm of general international law". As for paragraph 2, it was inappropriate to interpret the Charter. Moreover, a provision prohibiting any measure - not necessarily an extreme measure - of coercion jeopardizing the territorial integrity or political independence of a State could form a separate article.

87. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law (chap. IV), he noted that, after years of work on the topic, there was growing awareness of the importance of studies of international law on the environment. For the past 14 years, the Commission had continued to devote its time and energy to the topic, and had made slow progress. The work had made slow progress. The work of its most recent session might have provided a new impetus and could result in significant acceleration. The decisions which the Commission had taken, on the basis of the report of its working group, concerning its future work were convincing evidence of its determination to make further progress.

88. His delegation approved of the Commission's decision to focus attention on the drafting of articles in respect of activities creating a risk of causing transboundary harm. It wondered, however, whether it would be possible to make a definite distinction between issues of prevention and remedial measures since the two were closely intertwined. The problem of the

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title of the topic could be left until a later stage. As to the nature of the instrument to be drafted, the Commission was right in deferring a decision until the final stage of its work. He reserved the position of his Government on that issue.

89. Chapter V of the report was concerned with other decisions and conclusions of the Commission on which he would like to comment. He welcomed the appointment of a new Special Rapporteur for the topic "The law of the non-navigational uses of international watercourses". He also welcomed the decision by the Commission not to pursue its consideration of the topic "Relations between States and international organizations". As to the new topics for possible inclusion in the agenda, the "ripeness" of an area, from the point of view of codification, should be the principal criterion. It was, however, important to bear in mind the current workload of the Commission, as well as the prospects for the successful discharge of the Commission's duties within the current term of office of its members. His delegation was therefore in favour of postponing a decision on any extension of the Commission's agenda for at least one year.

90. Mr. BERMAN (United Kingdom) complimented the Commission on the quality of its report (A/47/10) and commended the Secretariat for having issued it promptly. Without wishing to go into the working methods of the Commission, which were largely its own concern, his delegation approved the steps it had already taken to establish a coherent programme for the next quinquennium. In particular, it supported the Commission's decision to plan its activities for the duration of the term of office of the Commission's membership. Since it seemed that the Commission would soon complete its work on the law of the non-navigational uses of international watercourses, the main items to be considered during the forthcoming period would be the question of an international criminal court and State responsibility. It would be a worthwhile contribution to the Decade of International Law for those items to be brought to completion. The target date of 1996 was not unrealistic. However, if that target was to be met, priorities would have to be reviewed and a phasing, or even a postponement, of work on other topics might be required, each case being judged against the criterion of the likelihood of achieving concrete results within a reasonable space of time.

91. When major projects came to an end, as planned, it was important not to leave a vacuum. However, the new topics proposed for consideration must be manageable and worthwhile, and must meet a felt need. The procedure described in paragraphs 369 and 370 of the report was interesting in that respect. It should be noted, however, that neither the identification of new topics, nor their selection, was a matter for the Commission alone. Governments had a vital role to play and they must be ready to play it.

(Mr. Berman, United Kingdom)

92. The chapter of the report on the topic of international liability for injurious consequences arising out of acts not prohibited by international law (chap. IV) was somewhat disappointing. The results of the Commission's work on the topic were uncertain. It was unfortunate that the Working Group established for that purpose had not taken a position on the basic issues which would have to be settled before an opinion could be formed on that work and on where it was leading.

93. His delegation welcomed the Commission's decision to concentrate on prevention and to deal at present only with activities having a risk of causing transboundary harm. That would help to confine the scope of the work to be done to a manageable size. It was, however, likely to have certain consequences. For example, if preventive obligations were to be established, there was no reason why the normal rules of State responsibility should not apply to breaches of those obligations, in much the same way as they applied to harm caused in breach of customary international law. Likewise, if a State failed to observe an obligation to consult or notify another State but no transboundary harm actually resulted, there was still an international wrong, but with somewhat different consequences which could be dealt with under the normal rules.

94. There was a doubtful dichotomy between activities involving risk and activities which caused harm: if an activity which caused harm was to give rise to preventive obligations on the part of the State of origin, the harm must be foreseeable. If the harm was foreseeable, then the activity was one involving risk. The likelihood or certainty of the harm should be one of the factors which triggered the preventive obligations, along with other factors such as the magnitude and reversibility of the harm. He saw no need, therefore, to distinguish between activities involving risk and those causing harm for the purposes of determining the applicable preventive regime. The Commission seemed to have arrived at the same conclusion.

95. Prevention could form part of a binding instrument. If so, it would be essential to define carefully the scope of application of the preventive obligations, as in the case of the Convention on Environmental Impact Assessment in a Transboundary Context of 1991. Recommendations or guidelines could conversely allow a less prescriptive approach, but would clearly bring back some uncertainty as to the legal consequences of their breach. There was a question as to whether it was necessary or appropriate to consider attaching legal liability to a State in respect of lawful acts. If transboundary harm occurred and could not be attributed to any breach on the part of the State of origin of its legal obligations, liability, if any, should rest with the operator, in accordance with the "polluter pays" principle. As his delegation had proposed the previous year, the topic should be renamed "International responsibility for transboundary harm". That much more straightforward title would meet an obvious need and would help to resolve the conceptual difficulties that had plagued the Commission over the years.

96. Mr. SZENASI (Hungary) said that the Hungarian Government was actively considering the draft articles on the law of the non-navigational uses of international watercourses and the draft Code of Crimes against the Peace and Security of Mankind. It attached special importance to the completion of work on the draft Code, in view of the situation in the former Yugoslavia and the fact that there was currently no international criminal jurisdiction to try war criminals.

97. His delegation had followed with great interest the work of the Working Group on the question of an international criminal jurisdiction (A/47/10, annex). It was of the view that the drafting of the Code of Crimes against the Peace and Security of Mankind (chap. II) should not necessarily be connected to the establishment of an international criminal jurisdiction, and that the statute of the court and the Code should constitute separate instruments. States should be able to become parties to both instruments or to only one of them and access to the court should not be restricted. Moreover, the court should not be a full-time body and should have no compulsory jurisdiction. Its jurisdiction should not exclude the concurrent jurisdiction of States. The court should be given a truly universal character. Irrespective of the seriousness of the crimes committed, the Code should refrain from imposing the death penalty. Furthermore, defendants brought before the court should enjoy guarantees of penal procedures at least equal to those existing under their national legislation. While it welcomed the progress made by the Commission in its consideration of the item, his delegation believed that States should be given a further opportunity to study its work carefully and to submit more detailed comments on it at the following session.

98. On the topic of "State responsibility" (chap. III), his delegation welcomed the progress that had been achieved and hoped that the Commission would be able to conclude its work by the end of the current term of office of its members by submitting to the international community a comprehensive and coherent set of articles covering all aspects of the topic.

99. On the specific problem of countermeasures, his delegation agreed that the regime under consideration should reduce to a minimum the scope of permissible unilateral initiatives. The margin for permissive countermeasures had been narrowed by the emergence of new opportunities for more effective use of existing mechanisms and procedures for the peaceful settlement of disputes and by the setting up of more suitable methods tailored to the special needs of certain groups of States.

100. The Committee should, however, adopt a realistic approach. Countermeasures were likely to subsist for a long time in inter-State relations. The main objective of any regime should therefore be to prevent any possible abuse, by strengthening safeguards. It was important to ensure that unilateral initiatives were kept within the limits of peremptory norms and other principles of contemporary international law, and to promote respect for law by compelling States to comply with their obligations and to submit

(Mr. Szenasi, Hungary)

their disputes to impartial third party settlement procedures. In that connection, there was a danger that the requirement regarding the exhaustion of all available dispute settlement procedures favoured powerful States to the detriment of weaker States.

101. On the topic of "International liability for injurious consequences arising out of acts not prohibited by international law" (chap. IV), his delegation attached particular importance to the many vital problems which it raised from the standpoint of the emerging international law on the protection of the environment. It had followed closely the work of the Commission on the topic and noted with regret that, because of a lack of consensus on many basic questions, the Commission had been unable to achieve any real progress in that area.

102. As for the other decisions and conclusions of the Commission (chap. V), his delegation noted with satisfaction that the Commission had been able to reduce the volume of its report significantly while preserving its highly professional character. It thought that some caution should be exercised in the selection of new topics for future consideration.

103. His delegation attached great importance to the International Law Seminar (paras. 383 to 391) in which a young Hungarian lawyer had participated in 1992.

104. Mr. ZMIYEVSKY (Russian Federation) said that the topic of State responsibility (A/47/10, chap. III) was one of the most complex in international law and that, in considering it, the Commission was playing a pioneering role. The fact that it was now approaching the final stages of the drafting of an instrument was due to the growing trend towards democracy which encouraged States to base their relations on international law.

105. The concept of countermeasures was central to consideration of the topic. The definition of that concept should not give it a punitive character, since that would be contrary to the peremptory norms of international law and would restore the vicious circle of "power politics" and the currently outmoded distinction between powerful and weak States. A thoughtful approach must therefore be adopted which would take account of the realities of the post-cold-war period and give due consideration to the interests of all parties through reliance on the new possibilities offered by the principles and norms of international law.

106. The Russian Federation believed that emphasis should be placed on a more effective use of the mechanisms and procedures for the peaceful settlement of disputes. More frequent resort to those mechanisms and procedures at the universal and regional levels would considerably reduce the scope of the reprisals admissible under contemporary international law. The increasingly widespread observance of the principle of the inadmissibility of the threat or use of force in international relations served to limit recourse to punitive

(Mr. Zmiyevsky, Russian Federation)

measures. The main problem with the concept of "response" (the expression which the Russian Federation preferred to "countermeasures") was the absence of a mechanism for the impartial and rapid determination of the existence of an internationally wrongful act. To grant an exclusive right to the injured State to determine the existence of a wrongful act would open the door to unilateral acts, many of which would be based on subjective decisions, and to abuses with serious consequences for the peace and happiness of peoples.

107. At a time when processes of disintegration were impeding the harmonious development of the international community, it was important to refrain from granting a legally superior standing to reprisals which were unilaterally decided upon and to establish instead a common legal standard which would serve as a framework for the collective action undertaken by the community of nations on the basis of the United Nations Charter and other universally recognized instruments with a view to preventing and eliminating the consequences of internationally wrongful acts.

The meeting rose at 6.20 p.m.